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Massachusetts Medical Marijuana and Injured Workers' Compensation Health Care:

Are Insurers Responsible, under G. L. c. 152, secs. 13 & 30, and relevant DIA Regulations, for Reimbursing Patients/Employees for Cannabis Treatment for Debilitating Pain Secondary to an Accepted Industrial Injury?

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I. LERNER OBJECTIVES RE PRESENTATION:

My presentation, as an experienced Massachusetts workers' compensation insurance defense attorney, will focus on defining, describing, and analyzing Massachusetts accepted industrial accident injury patient/Employees being treated with medical marijuana and said Employee's request at the Department of Industrial Accident (DIA) for reimbursement for the cost of said medication for treatment of chronic, intractable, and/or debilitating pain.

A. What is the state of the law in Massachusetts relative to reimbursement to the patient for medical marijuana care for treatment for chronic pain secondary to a compensable industrial injury?

B Is there any legal distinction between reimbursement to the injured Employee patient and/or to the provider for patient treatment with medical marijuana under applicable Massachusetts workers' compensation law?

C. What is the most probable objections and defenses likely to be raised by the Massachusetts workers' compensation insurance industry to Employee/patient claims for reimbursement of costs for treatment with Massachusetts medical marijuana?

D. Finally, will medical marijuana for treatment of chronic pain in the injured Massachusetts worker be deemed by the insurance industry reliable, reasonable, necessary, therapeutic, cost effective, and consistent with Massachusetts Marijuana Law and Workers Compensation Law, despite substantial, contra Federal law prohibiting the use of marijuana for any purposes, inclusive of medical?

II. OVERVIEW:

Even though only five (5) medical marijuana dispensaries are currently open in the Commonwealth, and the reviews on the websites are anything but favorable (e.g., "street is cheaper for better product," "Mafia had better management"), there is no doubt that the die has been cast, and medical marijuana is going to be part of the pallet of pain relief treatment for chronic pain patients residing in Massachusetts.

Will Massachusetts workers' compensation Insurers be ordered by the Department of Industrial Accidents (DIA) to reimburse Employees who lawfully purchase medical marijuana for treatment of chronic pain consistent with Massachusetts law?

In addressing the role of the payor for this new regime of treatment, i.e., the Health or Workers' Compensation Insurer, one might think that the regulations governing the administration of the medical marijuana delivery system in the Commonwealth, 105 C.M.R. 725.000 *et seq*., would be a natural jumping-off point. However, that is not the case.

The regulations, promulgated by the Department of Public Health, contain not a single provision addressing billing! The presumption of a third party payor that underlies every aspect of the provision of healthcare and pharmacological services is not even acknowledged in a cross-reference to some yet-to-be formulated schedule of rates/prices. Moreover, the statute governing the setting of rates for healthcare services in the workers' compensation arena (along with other state regulated systems), M.G.L. c. 118G, has nothing regarding the rates for pricing medical marijuana. The same is true of its cognate regulations, 114.3 C.M.R. 6.00 *et seq*.

What, then, happens when the lawful, card-carrying Massachusetts medical marijuana patient, arrives at the dispensary, with his medical marijuana certificate, certifying physician's "prescription," his DIA "Utilization Review" card, and an Order from an Administrative Judge, at the DIA, that the workers' compensation Insurer "pay" for the medical marijuana?

Assuming it is even open at the time said injured worker made an appointment to buy his medical marijuana (apparently a current problem), there is simply no structure in which such a transaction can be conducted with the usual modality of direct insurer billing. In the Commonwealth, it is illegal, under the provision of "adequate and reasonable" medical services, under G. L. c. 152, secs. 13 and 30, for medical marijuana to be paid for by Insurer on the patient/Employee's behalf, unless reimbursement for an injured Employee's out-of-pocket medicals is authorized by DIA Order.

Nonetheless, at the DIA, such Orders for patient/injured worker reimbursement have, in fact, issued in two (2) cases this year![1]

In the first Massachusetts DIA case,[2] the Judge ordered that the Insurer reimburse the Employee for 90 grams of medical marijuana per month, at a rate not to exceed $900 per month. The Order issued from the sec. 10A Conference, so there has, as yet, been no evidentiary Hearing on the issue. The Order was for ongoing treatment, from the date of the Conference, and it did not cover medical marijuana obtained prior to the Conference. This is on Appeal by the Insurer.

In the second Massachusetts DIA case[3], the Judge, again at Conference, ordered that the Insurer reimburse the injured worker's costs for medical marijuana, as prescribed by the Employee's treating physician. The Order also stated that the dispensary must provide documentation to verify the proper amount of reimbursement due the Massachusetts Employee. This Order is likewise on Appeal by the Insurer.

Beyond this practical issue, the question of the compensability, *vel non*, of medical marijuana will need to be addressed, on a case-by-case basis, as with every health care service provided under c. 152: Is the treatment of chronic pain, with medical marijuana, reasonable, necessary, and causally related to the work injury?

[1] Confirmed by email, February 10, 2016, from DIA Senior Judge Omar Hernandez to author.
[2] Id.
[3] Id.

Although there is scientific literature that supports the theory that marijuana can be an asset in the treatment of intractable pain, when used in conjunction with opioids (see, e.g., study by Donald Abrams, published in Clinical Pharmacology & Therapeutics, U. Cal. San Francisco, 2011), there clearly needs to be more peer reviewed double-blind scientific studies in this area, and Insurer challenges to the scientific reliability of and the claimed therapeutic benefits of medical marijuana can be expected. See Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994); and Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-595 (1993). A, "Themed Issue on Cannabinoids in Biology and Medicine," British Journal of Pharmacology, #163 (2011), features a good collection of marijuana efficiency studies.

On the other hand, if the effect of the addition of marijuana to the opioid treatment of chronic pain protocol is shown to be clinically significant in any given case, it would likely be in the Insurer's interest to accept the proposed treatment regimen. The U.Cal. study, supra, noted between a 20% to 33% increase in pain relief with the addition of marijuana to an opioid regimen. Again, whether this is a reliable figure is unclear at this time. Nonetheless, if this is a reasonable medical expectation for the increase in effective pain relief, the amount of opioid prescribed could be reduced or discontinued, treatment costs could be lowered, and the overall well-being of the injured workers could be well-served by such a marijuana treatment protocol.

Without knowing the economic piece of the marijuana treatment puzzle, as noted, it is impossible to forecast whether such a protocol could even redound to the Insurer's financial interest *vis-à-vis* maintenance of costly and substantial opioid reserves for its long-term obligations to workers with intractable pain. Nonetheless, it would appear to be a distinct possibility.

Finally, it must not be overlooked that marijuana, under *any* characterization, and any and every iteration, is still illegal under Federal Law, period![4] The discretionary neglect of United States Dept. of Justice to the current state-by-state uprising against the Federal prohibition is just that; discretionary determination not to enforce Federal laws; it could change at any time. [5]

For now, the US Attorney will not enforce Federal law outlawing marijuana use for medical purposes and will defer to state and local authorities regarding enforcement of marijuana law. [6]

As professionals in risk-aversion, that contingency – *albeit* not likely – is not exactly within the insurance industry's "comfort zone!"

[4] Controlled Substances Act (CSA) U.S.C. Secs. 801-904. CSA does not exempt marijuana users for medical purposes from its prohibition of possession or distribution of even small amounts of marijuana 21 U.S.C. sec. 812, 822, 834 (f).

[5] Id.

[6] See US Department of Justice Memo to the contrary regarding DOJ Guidance regarding Medical Marijuana Enforcement of Federal Laws, 8/29/13, revised 2/14/14, and the recent 2015 Federal Budget provisions prohibiting use of DOJ funds to shut down any State, legal medical marijuana program.

Questions even arise as to whether an Insurer, which has knowledge, for example, of an injured worker's relocation to Florida (not uncommon for the permanently disabled), would be obligated to seek a discontinuance of marijuana "treatment." The Massachusetts medical marijuana statute is clear that *only* those whose "primary residence" is within the Commonwealth may be eligible to qualify. Nonetheless, as a practical matter, residence requirements are routinely circumvented in all realms of daily living. Indeed, for a treatment protocol to be entirely bounded by state lines is unprecedented.

There will surely be more unusual issues to arise. Stay tuned.

III. IS EMPLOYEE CLAIM FOR REIMBURSEMENT FOR MASSACHUSETTS MEDICAL MARIJUANNA REASONABLE, NECESSARY, CAUSUALLY RELATED AND COMPENSIBLE UNDER MASS. GEN. L. ch. 152 §§ 13 AND 30 AND RELEVANT MASSACHUSETTS DIA REGULATIONS AND CASE LAW:

The $64,000 question, answered in a tentative and temporary DIA/Massachusetts legal format, known as a Temporary Conference Order is "yes!" [7]

Insofar as there are no reported cases in Massachusetts, on this particular issue,[8] it is incumbent on the insurance industry to consider all available defenses to Employee claims for reimbursement for medical marijuana under the Massachusetts Medical Marijuana Statute[9] and the Massachusetts workers' compensation statute. [10]

What issues might an insurance company raise in defense?

Insurer's have multiple issues available to contest the anticipated patient/Employee claims for reimbursement for Massachusetts medical marijuana

A. Federal Law/Preemption Doctrine:

Massachusetts Medical Marijuana remains a scheduled Class I drug, under Federal Criminal Law, making its possession and use for any and all purposes illegal at the Federal level.[11]

Therefore, any Massachusetts DIA Order or action authorizing or subsidizing the use of marijuana for Massachusetts medical purposes is illegal under United States Law.[12]

Federal law, trumps, any and every State Law, contrary to Federal Law.[13] Hence, the Massachusetts Workers' Compensation Law, as applied, cannot subsidize the use of marijuana for any and all purposes illegal under the U.S. Federal Criminal Code.

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[7] Senior Judge Omar Hernandez email, February 10, 2016, to author re status of employee medical marijuana claims litigation at DIA.

[8] Id.

[9] M.G. L. c. 369 of the Acts of 2012. An Act for the Humanitarian use of Marijuana.

[10] M.G.L. c. 152.

[11] See US Department of Justice Memo to the contrary regarding DOJ Guidance regarding Medical Marijuana Enforcement of Federal Laws, 8/29/13, revised 2/14/14, and the recent 2015 Federal Budget provisions prohibiting use of DOJ funds to shut down any State, legal medical marijuana program.

[12] Gonzales v Raich, 545 US 1. 27 – 28 (2005).

B. Reliability:

Next, the Massachusetts insurer is likely to attack medical marijuana as a scientifically unreliable treatment modality for chronic pain / debilitating pain / intractable pain.

As a matter of law, including the leading Massachusetts evidentiary case, Commonwealth vs Lanigan,[14] on reliability of scientific evidence relative to issues of causation and treatment, the industry is going to argue that there is a lack of credible, scientific evidence, and/or a generally accepted scientific community consensus that accepts medical marijuana as a therapeutic treatment modality: safe and effective medicine for treatment of chronic pain.

Among other things, the insurance industry in Massachusetts is likely to argue that a sharp, distinct and determinative contrast exists between most marijuana studies regarding its efficacy for treatment of chronic pain versus similar manifold studies for the safe and effective opioid treatment for chronic pain, including Phase Three FDA Clinical Trials for pain management. In a scientific sense, medical marijuana simply has not been proven effective for treatment of chronic pain, pursuant to generally accepted and adopted FDA Protocols and Guidelines, like the Opioids.

Insurers are also likely to argue that the medical evidence on the efficacy of medical marijuana for treatment of chronic pain has insufficient testing parameters for medical marijuana's efficiency in this important area of medical care and treatment.

Similarly, insurer will likely challenge the reliability of marijuana treatment for the eight (8) listed qualifying Massachusetts medical conditions.[15]

The industry is also certain to argue, in contra-distinction to the Opioids, that the FDA has not approved marijuana for treatment of any condition or any disease, especially inclusive of chronic pain / debilitating pain / intractable pain.

C. Not Reasonable:

Next, the insurer is likely to argue, with detailed reference to the particular facts of the contested case involving an injured patient/worker who has chronic pain, that it is not reasonable to compel the insurer to reimburse the Employee for treatment of chronic pain with Massachusetts medical marijuana.

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[13] US Constitution Supremacy Clause and Gonzales v Raich, Supra, id.at 27-28.

[14] Commonwealth v Lanigan, supra, at 25-26

[15] M.G.L. c. 369 of The Acts of 2012. An Act For The Humanitarian Use of Marijuana, sec. 2 (c).

This defense would be a precise, scientific and fact-driven argument suggesting that, especially given the dearth of evidence as to the scientific reliability of the medical marijuana treatment protocols, that the insurer be required to reimburse the Employee for this treatment modality, when there are innumerable alterative, evidence-based treatments, both prescription and non-prescription, inclusive of behavioral, physical, and pharmacological, as or even more likely to result in effective chronic pain treatment release, than Massachusetts medical marijuana.

D. Necessity:

Next, the insurer is likely to argue necessity.

Necessity is a term of art in Massachusetts workers' compensation litigation and goes not to whether the challenged medical care, in this case, medical marijuana, is necessary, in the sense that nothing else will work, but in terms of its strength, dose, and length of time as an approved prescription drug.[16]

In this way, the necessity argument will be made that, if any benefits are awarded to reimburse the injured patient/Employee for medical marijuana purchased and utilized under the Massachusetts Statute,[17] that the Order should be for a brief period of time and certainly should not be for lengthy, open-ended, or medical mega-dosage marijuana care and treatment.

E. Reimbursement of Patient Employee Expenses for Medical Use of Marijuana:

The normal course of an Employee's claim for treatment within the Massachusetts workers' compensation system, G. L. c. 152, sec. 30, presents issues of whether the proposed treatment is: reasonable; necessary for the Employee's healthcare; and causally related to the work injury covered by the Insurer. Section 30 governs the medical and health care benefits claimed. Section 13 addresses the rates of payment for such reasonable, necessary and causally related treatment.

The unusual aspect of any claim for reimbursement for an Employee's payment for medical marijuana is that the Insurer cannot fulfill its primary obligation under sec. 30: medical benefits paid directly to the provider, without provider recourse for patient reimbursement and no independent patient financial obligation. Once an Insurer accepts, or is ordered to accept, liability for a work injury, sec. 30 ensures that medical treatment for that injury is paid by the Insurer at the rates established by the Workers' Compensation Health Services Board. Employee has no obligation to pay for said compensable treatment. Period.

[16] Lewin vs Danvers Butchery, 13 Mass. Workers. Comp, Rep. 18, 19-20, n.1, (1999).
[17] MGL c. 369 of the Acts of 2012, "An Act for Humanitarian Use of Marijuana."

Since the only lawful method of payment at the Massachusetts medical marijuana dispensaries is self-pay, an Insurer can raise the defense that there is no vehicle for its compliance with sec. 30 medical treatment and related sec. 13 payments. Therefore, any Order for reimbursement is contrary to law and/or beyond the scope of the Administrative Judge's authority.

Moreover, the medical marijuana law (M.G.L. c. 369, sec. 7[B]) specifically states that it does not require *health* Insurers to provide reimbursement for medical marijuana.[18] A Workers' Compensation Insurer could argue, analogously, that it is against legislative intent to compel any insurer/third party payer, especially a Workers' Compensation Insurer, to become part of the medical marijuana transaction, even by way a patient/Employee reimbursement.

There is no workers' compensation rate of payment for medical marijuana at the present time. Thus, the Insurer can object to the order of reimbursement on the basis of that undefined, but necessary, Massachusetts rate-setting sec. 13 standard. Depending on what the Employee presents as the amount of marijuana his treating physician certifies as being the reasonable and necessary treatment for the accepted injury, the amount of reimbursement likely can vary greatly. But when the same amount can be claimed at different rates – that some types of marijuana presumably are more expensive than other – the ongoing obligation to provide reimbursement could yield additional arbitrary and unlawful results.

F. Inadequate Massachusetts Marijuana Documentation:

Moreover, the Insurer may rightly require the Employee to produce adequate documentation of the amount paid, by providing receipts from the dispensary.[19] Otherwise, reimbursement is unlawful.

G. Is Treating Doctor Qualified?

The Employee must always carry the burden of proving entitlement to *any* benefits payable under c. 152, including medical healthcare services and related out-of-pocket expense.[20] Proof of all medical issues is provided by expert medical opinion evidence. The treating physician, whose certification it is that brings the Employee to the claim for reimbursement, will be the source of such proof of reasonableness, necessity and causal relationship.

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[18] "Nothing in this law requires any health insurance provider, or any governmental agency or authority, to reimburse any person for the expenses of the medical care and use of marijuana."

[19] This is an issue in litigation presently at the DIA. See Judge Hernandez email to author, supra, February 10, 2016.

[20] It is the employee's burden to produce evidence on all the elements of his claim. Connolly's Case, 41 Mass. App. Ct. 35, 37 (1996), citing Ginley's Case, 244 Mass. 346, 348 (1923), and Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988), including that he was and is incapacitated from some work. Martin v. Town of Swansea, 12 Mass. Workers' Comp. Rep. 447 (1998)

H. What is Qualified Treating Doctor's Opinion?

The other issue that these reimbursement claims will likely bring forward is the certifying physician's opinion that the patient/Employee suffers from a statutory debilitating medical condition[21] and that the potential health benefits of medical marijuana would likely outweigh the health risks. An Insurer can challenge that certification, as outside of the realm of adjudication under c. 152. In other words, the fact that medical marijuana claims involve *sui generis* matters probably would be a valid basis for *increasing* the Employee's burden of proof, not meeting it by perfunctory compliance with G.L. c. 369.

For example, the Court of Appeals in New Mexico has recently held that the Employee's satisfaction of that state's certification requirements is not[22] subject to review by an Administrative Judge applying New Mexico's workers' compensation act. Nonetheless, it is another issue which the Massachusetts Insurer might raise in defense: Whether the certifying physician's opinion is supported by the record evidence.

Is the condition debilitating; amenable to treatment with marijuana; and do the health benefits outweigh the health risks?

Are the eight (8) specific medical conditions eligible for Massachusetts cannabis treatment, especially the "other" qualifying, "debilitating medical condition," amenable to cannabis therapy?[23] [24]

IV. CONCLUSION:

It is very early in the Massachusetts medical marijuana wars. Insurer reaction to patient/Employee Massachusetts workers' compensation claims for treatment of chronic pain by way of treatment with Massachusetts medial marijuana remains to be seen.

Should insurers be motivated by costs and benefits, as well as complex and conflicting Federal and State statutes and regulations?

For example, Massachusetts medical cannabis may turn out to be not only more effective, but less addictive and less costly a medication, than more potent, effective, controversial, addictive, and costly prescription drugs like the opioids.

On the other hand, it certainly is possible that Massachusetts medical cannabis may prove to be a significant cost-driver for Massachusetts workers' compensation chronic pain injury claims; especially if there are known or unknown, seen or unforeseen, side effects that necessitate additional medications or additional costly medical treatment modalities, that may actually impair, impede, or even prevent the patient/Employee from returning to gainful employment and/or achieving demonstrable pain relief.

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[21] G.L. c. 369, sec. 2(c).

[22] Lewis v American General Media, N.M. App, June 26, 2015.

[23] G.L. c. 369, sec. 2(2).

[24] According to recent Lowell Sun News article (08/24/15) by Todd Feathers, more than 90% of Massachusetts medical marijuana cardholders (22,130) certificates relate to a doctor certified debilitating condition (i.e. chronic / intractable / debilitating pain). Only 10% of the certificates relate to the eight (8) prequalifying "other" medical marijuana conditions.

It simply is: way too early to determine, to a reasonable legal certainty, the overall effect of Massachusetts medical cannabis on the Massachusetts worker's compensation claims industry; or even to accurately predict the position that the Department of Industrial Accidents will take regarding treating industrial injuries and Employee reimbursement for Massachusetts medical marijuana care.

We will watch, and listen, and learn.

Thank you for your time, professionalism, empathy, and attention.

Edward M. Moriarty, Jr.

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